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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

Larry F. Smith,

Petitioner,

vs.

Edward J. and Diana Grace,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Texas
Case Nos. 96-0461 and 92-07397-A

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QUESTION PRESENTED

Whether Texas Rules or the application of Texas state appellate procedural rules violate a litigants fundamental right of due process by preventing a meaningful recourse to the appellate courts.

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PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Texas
Case Nos. 96-0461 and 92-07397-A

Larry F. Smith petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinions of the Texas Supreme Court and the opinions of the Court of Appeals for the Fifth District of Texas are not reported (Pet. App. A - C).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. The ruling of the Texas Supreme Court was issued on August 1, 1996. The Texas Supreme Court's ruling on Petitioner's Motion for Rehearing was entered on October 3, 1996.

CONSTITUTIONAL PROVISIONS INVOLVED

The 14th Amendment to the Constitution of the United States provides in pertinent part:

> "No State shall...deny to any person within its jurisdiction the equal protection of the laws."

Article 1 § 13 of the Constitution of the State of Texas provides in pertinent part:

> "All Courts shall be open, and every person...shall have remedy by due course of the law."

STATUTORY PROVISIONS INVOLVED

The Texas Government Code Ann. § 2.004 (West 1988) provides in pertinent part:

> "The Supreme Court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant."

RULES INVOLVED

Rule 53(k) of the Texas of Appellate Procedure provides as follows:

> "It is the Appellant's duty to cause the Statement of Facts to be filed with the Clerk of the Court of Appeals."

Rule 54(a) of the Texas Rules of Appellate Procedure provides, in pertinent part, as follows:

> "[I]f a timely motion for new trial or motion to modify judgment has been filed by any party...[the statement of facts shall be filed] within 120 days after the judgment is signed."

Rule 54(c) of the Texas Rules of Appellate Procedure provides, in pertinent part, as follows:

> "An extension of time may be granted for late filing in a court of appeals of a...statement of facts, if a motion...is filed by Appellant with the Court of Appeals not later than 15 days after the last date for filing the record."

Rule 56(b) of the Texas Rules of Appellate Procedure provides as follows:

> "Upon receipt of the statement of facts, the clerk shall ascertain if it is presented within the time allowed and also if it has been properly authenticated in accordance with these rules. If the clerk finds that the statement of facts is presented in time...the clerk shall file it forthwith; otherwise the clerk shall endorse thereon the time of receipt...and notify the party (or the parties attorney) tendering the statement of facts of the action...."

Rule 83 of the Texas Rules of Appellate Procedure provides, in pertinent part, as follows:

> "A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance without allowing a reasonable time to correct or amend such defects...".

STATEMENT OF THE CASE

A. Course of Proceedings

This case involves the constitutionality of several state appellate rules and the application of those rules by the courts in Texas. Those rules are ones directing the time limits for the filing of statements of facts (the Texas equivalent of a Transcript), the requirements for extensions and the duty of the appellate clerk, in the event of an untimely filed statement of facts.

On January 24, 1996, the Court of Appeals for the Fifth District of Texas affirmed the judgment of the trail court, in part, upholding its denial of Appellant's right to have the benefit of a Statement of Facts considered on appeal. This ruling was made even though the court of appeals recognized that (i) the court reporter has ultimate control over the filing of the Statement of Facts, (ii) the appellate clerk failed to notify Petitioner of the late filing, as required by the Texas Rules of Appellate Procedure; and iii) Petitioner was not informed of the late filing of the Statement of Facts until after the period to request extensions had expired. The appellate court held that, among other things, it was Appellant's burden to ensure that the Statement of Facts was timely or that a Motion for Extension was filed within fifteen (15) days from the due date for the Statement of Facts. The court further held that the failure of the appellate clerk's affirmative duty to notify Appellant of the court reporter's late filing of the Statement of Facts did not excuse Appellant from his duties (Pet. App. A). This holding denied Petitioner the right to have the trial proceedings considered by the appellate court and effectively prevented any possibility of a meaningful appeal.

On August 1, 1996, the Texas Supreme Court overruled Petitioner's Application for Writ of Error without opinion (Pet. App. B). On October 3, 1996, the Texas Supreme Court overruled Petitioner's Motion for Rehearing -- again without opinion (Pet. App. C).

B. Statement of Facts

The matter now brought before the Court arises out of cause no. 92-07397-A, styled Edward J. Grace and Diana Grace v. Larry F. Smith, Concrete Construction Systems Corp., Steve G. Hanna d/b/a Concrete Contractors and T.R. Connally, filed in the 14th Judicial District of Dallas County, Texas.

Suit was initiated by Edward and Diana Grace, alleging that cracks had formed in the foundation of their home, the design of which was created by Concrete Construction Systems Corp., the company that was subcontracted to contribute the design of the foundation. The design was prepared by its employee Larry F. Smith. At sometime thereafter, the foundation of the Grace's home supposedly cracked, and the Graces filed suit against a number of individuals and entities, including Larry F. Smith (hereinafter, "Appellant" and/or "Petitioner").

Following a non-jury trial, the trial court entered judgment in the amount of $254,113.78 plus interest, solely against Petitioner and entered take nothing judgments against his employer.

Defendant Larry F. Smith filed a Motion for New Trial on November 4, 1994, which was denied by the trial judge on December 15, 1994. This brought rise to appellate cause no. 05-95-00155, filed with the Fifth

District Court of Appeals, styled Larry F. Smith, Appellant v. Edward J. and Diana Grace, Appellees. Appellant properly perfected his appeal on January 3, 1995, and concurrently requested that the court reporter of the 14th Judicial District prepare the Statement of Facts, and that the court clerk of that same district prepare the transcript.

At about the time of the due date for the filing of the Statement of Facts, Appellant spoke with the court reporter for the 14th Judicial District, who confirmed that the Statement of Facts had been filed with the Fifth District Court of Appeals. Appellant had no reason to further question the court reporter's statements, calculations and filing being one of the frequent duties required of her position with the court - and accepted her acknowledgment that the Statement of Facts had been filed. What must be appreciated, as well, is that only a timely filed Statement of Facts may be *filed* by the appellate clerk (see Rule 56(b) of the Texas Rules of Appellate Procedure). What the court reporter did not report was that, although presented, the Statement of Facts was presented late. Further, as Appellant was not given notice to the contrary, as provided for in Rule 56(b) of the Texas Rules of Appellate Procedure, Appellant rested assured that the transcript and Statement of Facts had been properly filed with the Fifth District Court of Appeals Appellate Court.

Approximately twenty-one (21) days after the deadline for filing the Statement of Facts, by mere chance, Appellant later became aware that, although the Statement of Facts was submitted to the appellate court, it was submitted out of time and had, therefore, not been filed. Upon communicating with the appellate clerk, Appellant was then informed that she had marked the Statement of Facts "received", but had not filed it with the court. The appellate clerk had declined to

properly notify Appellant and/or his counsel that the Statement of Facts was improperly submitted.

As a result of the collective efforts of the court reporter and the appellate clerk, Appellant was beyond the time to apply for an extension and was precluded from entering evidence crucial to his appeal. Appellant has been denied his rights of due process by rules of appellate procedure which are designed and applied to make him responsible for events out of his control and command, and suffer the consequences of acts of court officials, who do not answer to or for him.

Immediately upon being advised of this infraction, Petitioner filed a request for additional time to file the Statement of Facts, functionally pointing out the infringement on his rights to due process and appeal. The Motion to Extend the Time to File the Statement of Facts was, however, overruled and Petitioner's Statement of Facts was stricken from the appellate record.

Petitioner has proceeded through all levels of the courts of Texas praying for relief from the collective errors of officials of the court, which have prejudiced his right to effectively present his cause to the appellate level.

Petitioner's appeal is meritorious and it would be unconstitutional to disallow him the ability to utilize all elements of the record in his appeal, when the reasons for disallowal are neither his fault nor within his control.. Petitioner holds the procedures imposed by the appellate courts of the State of Texas in the highest regard, and has made every effort to judiciously comply with those deadlines. Petitioner should not be harmed by errors of the court system itself.

C. Texas Supreme Court Rule Revisions

The precise issue of this appeal - the unfair burden imputed upon Appellant to ensure that the Statement of Facts is timely filed with the appellate court - has already been presented to the Texas Supreme Court for reconsideration. On November 20, 1996, the Texas Supreme Court Advisory Committee sent to the press the "Preliminary Draft of Proposed Revisions to the Texas Rules of Appellate Procedure". The proposed rules have been submitted to the Texas Supreme Court, the members of which have returned their tentative modifications to the advisory committee. The modifications pertaining to the issue of the appeal before you now includes the removal of Rule 53(k):

> (k) **Duty of Appellant to File.** It is the appellant's duty to cause to statement of facts to be filed with the clerk of the court of appeals."

The Texas Supreme Court Advisory Board and the Texas Supreme Court apparently recognize the unfair responsibility they have imposed upon appellants in making them responsible for something out of their control. As such, the tentative revision of Rule 54(c) reads as follows

> (2) "**Statement of Facts.** The official or deputy reporter or recorder is responsible for timely filing the statement of facts...
> (3) **Courts to ensure record timely filed.** The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed. The appellate court must allow the

> record to be filed late when the delay is not the appellant's fault, and may do so when the delay is the appellant's fault."

The Supreme Court appears ready to approve rules that would shift the burden of ensuring that the Statement of Facts and the transcript are timely filed with the court of appeals, from the appellant to the court officials who are responsible for the preparation thereof. The Supreme Court Advisory Committee recognizes the unjust nature of requiring Appellant to be ultimately responsible for a deadline over which Appellant has no control.

The Supreme Court Advisory Committee reportedly expects that the revised rules of appellate procedure will be in effect in early 1997. It would be absolutely unjust to bar Petitioner from presenting his Statement of Facts to the appellate court as a direct result of an error in appellate procedure, which is presently undergoing revision to prevent this very incident from happening in the future. The relevant proposed revisions are attached to this Petition for the convenience of the Court (Pet. App. D).

D. Reasons for Granting Petition

Petitioner respectfully requests that the Supreme Court of the United States grant him the same rights of due process which will be provided to litigants filing appellate actions in the upcoming year. The Supreme Court of Texas is now recognizing that Appellants rely upon the expertise and efficiency of court reporters in presenting their cause to the appellate courts; however, they should not be punished and barred from presenting a complete record to the appellate courts in the event

that a court reporter or clerk falls short of the duties implied upon these officers of the trial court.

1. PETITIONER SHOULD NOT BE BARRED FROM PRESENTING A COMPLETE RECORD TO THE APPELLATE COURT AS A RESULT OF A COURT OFFICIAL'S DISREGARD FOR THE RULES OF APPELLATE PROCEDURE

The complete Statement of Facts was received by the Texas Court of Appeals on February 8, 1995 -- six (6) days after the deadline for the timely filing of same, but within time for filing an extension. Counsel for Appellant was advised by the court reporter that the Statement of Facts was filed; however, the appellate clerk declined to advise Appellant's counsel, that, upon presentation, the Statement of Facts was late and therefore, not *filed*. Instead the clerk merely marked the Statement of Facts "received" and set it aside, not intending to actually *file* it until further action by Appellant. At that point it was crucial that, with the notice the clerk is required to provide under the rules of appellate procedure, appellant still had the opportunity to seek extension and secure materials necessary to support his position on appeal. Appellant's counsel was functionally misled by court officials -- i) the reporter, who advised that the Statement of Facts had been filed; and ii) the clerk, who stood mute.

Pursuant to Rule 56(b), the Clerk must provide as follows:

> "**Duty of Clerk on Receiving Statement of Facts.** Upon receipt of a Statement of Facts, the clerk shall ascertain if it is presented within the time allowed and also if it has been properly authenticated

> in accordance with these rules. If the clerk finds that the statement of facts is presented in time and has been certified by the official court reporter, the clerk shall file it forthwith; otherwise, the clerk shall endorse thereon the time of the receipt of such statement of facts, hold the same subject to the order of the court of appeals, and notify the party (or the party's attorney) tendering the statement of facts of the action and state the reasons therefor."

Had the Clerk fully complied with Rule 56(b), Appellant would have been properly advised of the late submittance of the Statement of Facts, and the Motion to Extend would unquestionably have been filed timely filed -- and granted, as such first motions are routine in Texas appellate practice.

Petitioner's dilemma, and that of many other Texas appellants, has already been addressed by the Texas appellate courts in the dictum included in the concurring opinion of Judge Enoch in *Krasniqi v. Dallas County Child Protective Services Unit of the Texas Department of Human Services*, 809 S.W.2d 927 (Tex. App. - Dallas, 1991, writ denied), cert. denied, 112 S.Ct. 1763, 2274 (1992). *Krasniqi*, involved facts somewhat similar to this case and Judge Enoch addressed the harshness of the rules concerning the Statement of Facts as follows:

> "Perhaps it makes more sense. Unlike a brief which is under the sole control of the attorney, the transcript is prepared by the trial court clerk and the statement of facts is prepared by the court reporter, and consequently, the

attorney who is the 'responsible' party may, in fact, not know that the record has not been filed. (*Id.* at 934-935.)"

Petitioner respectfully suggests this opinion formed the basis for the proposed appellate rules changes cited above and is a rule of reason that should be invoked in this situation. Certainly the constitutional mandate of due process under the 14th amendment demands no less.

2. STATEMENT OF FACTS WAS TIMELY FILED UNDER RULE 54 OF THE TEXAS RULES OF APPELLATE PROCEDURE

The complete Statement of Facts was filed outside of the time provided for by Rule 54(a), but was filed within the time provided for the filing of an extension of time to file the Statement of Facts. The appellate court should have exercised its discretion and determined that such a filing necessarily implied a request for an extension.

This principle was recognized in *Sanchez v. State*, 885 S.W.2d 444 (Tex. App. - Corpus Christi 1994, no writ). In *Sanchez*, the court considered a virtually identical circumstance, wherein was discussed the harmony of civil and criminal appellate rules and the failure to timely file a notice of appeal. The court noted that, although the appellant did not timely file his notice of appeal, he did file the notice of appeal within the fifteen (15) day time period provided for filing of a motion for extension of time. The court held that the notice of appeal was timely filed. The court determined that the filing of the notice of appeal within the grace period for filing motions for extension necessarily implies a proper request for extension of time...."

In *Sanchez*, the court concluded its reasoning as follows:

> "[t]he Rules of Appellate Procedure as embodied by Rule 83 and 2(b), favor a policy of having Texas Courts of Appeals address cases on their own merits, rather than allowing the courts to close their doors to appellants who, through no fault of their own, fail to find their way successfully through the labyrinth of procedure."

Id. at 446.

In this instance, the Statement of Facts should have similarly been accepted. Rules of Appellate Procedure providing due process protections should not be ignored, and seemingly contrary rules should not be used as a technical whip to punish the Petitioner, who through no fault of his own, failed to find his way through the labyrinth.

3. THE ISSUE OF PETITIONER'S APPEAL CONSTITUTES A DEFECT IN APPELLATE PROCEDURE UNDER RULE 83 OF THE TEXAS RULES OF APPELLATE PROCEDURE.

As part of the record in this case, the appellate court had for its review and analysis a portion of the Statement of Facts, which was included within the transcript (the record). The absence of a complete Statement of Facts should have been considered by the court to be a defect in appellate procedure and the filing of the remaining portion allowed. As a further due process protection for Texas litigants, Rule 83 of the Texas Rules of Appellate Procedure provides in relevant part the following:

> "[a] judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects...." (Tex. R. App. P. 83).

In a remarkably similar case, *Crais v. Haynes*, 867 S.W.2d 413, 414 (Tex. App. - Waco 1993, no writ), the Waco Court of Appeals was confronted with a situation wherein part of the transcript had been filed, but significant portions of the transcript were absent from the record. While the court recognized that it is the Appellant's burden to obtain the timely filing of the transcript, the court determined that the failure to file a complete transcript was a "defect" in appellate procedure and ordered the completion of the record.

In the instant case, Petitioner respectfully suggests that the Texas appellate courts erred in the

application of the Texas Rules of Appellate Procedure. Petitioner should not be denied his rights of due process because of a defect in procedure.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted on this the 31st day, 1996.

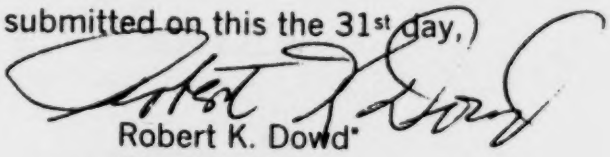

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EXHIBIT "A"

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LARRY F. SMITH, Appellant

No. 05-95-00155-CV V.

EDWARD J. AND DIANA GRACE,
Appellees

Appeal from the 14th Judicial District Court of Dallas County, Texas. (Tr.Ct.No. 92-7397-A).
Opinion delivered by Justice James, Justices Barber and Wright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED.** It is **ORDERED** that appellees EDWARD J. AND DIANA GRACE recover their costs of this appeal from appellant LARRY F. SMITH and from the cash deposit in lieu of cost bond. After all costs have been paid, the clerk of the district court is directed to release the balance, if any, of the cash deposit to Robert Dowd, attorney for appellant Larry F. Smith.

Judgment entered January 24, 1996.

TOM JAMES
JUSTICE

Affirmed and Opinion filed January 24, 1996.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-95-00155-CV

LARRY F. SMITH, Appellant
V.
EDWARD J. AND DIANA GRACE, Appellees

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 92-7397-A

O P I N I O N

Before Justices Barber, James, and Wright
Opinion By Justice James

Larry F. Smith appeals the trial court's judgment awarding actual and exemplary damages to Edward J. and Diana Grace. In seven points of error, Smith complains generally that: (1) this Court erred *in* refusing to file the statement *of facts; (2)* the judgment is against the great weight and preponderance of the evidence; (3) the trial *court* miscalculated actual damages; (4) the trial court erred in awarding excessive actual and punitive damages; (5) the trial court failed to apply chapter 27 of the Texas Property Code; and (6) the trial court erred in awarding a take-nothing judgment against Smith's employer. We affirm the trial court's judgment.

PROCEDURAL AND FACTUAL BACKGROUND

The Graces built a home in an area known as Stonebriar. They purchased the developed lot from Stonebriar General Partnership. The Graces contracted with T.R. Connally, one of Stonebriar's approved builders, to build the house. Connally hired Steve Hanna d/b/a Concrete Contractors to construct the foundation. Concrete Construction Systems, Inc. (CCS) designed the plans for the construction of the foundation system. Smith is employed by CCS as an engineer and did the design work on the foundation system.

After the Graces moved into their new home, they noticed the house was moving and cracking. Eventually, the foundation cracked, and the Graces filed suit against Smith, CCS, Stonebriar, Hanna, and Connally. Smith and CCS counterclaimed for bad faith under the DTPA.

Stonebriar settled with the Graces, and the claims against Stonebriar were dismissed. Smith and CCS proceeded to a trial before the court. Connally and Hanna did not appear at trial. On October 5, 1994, the trial court rendered a judgment that: (1) Smith and CCS take nothing on their counterclaim against the Graces; (2) the Graces take nothing on their claims against Connally and CCS; and (3) awarded the Graces actual and punitive damages from Smith, individually. The judgment does not expressly dispose of the Graces' claims against Hanna.

JURISDICTION

Because we questioned the finality of the trial court's judgment in this appeal, we directed the par-

ties to file a supplemental transcript containing an order expressly disposing of claims or parties that might remain pending. We now consider, *sua sponte*, whether there is a final, appealable judgment. *See Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 468 (Tex. App.--Dallas 1994, writ denied) (we must inquire into our own jurisdiction, even if it is necessary to do so *sua sponte*).

Applicable Law

Final judgments are appealable. To be final, a judgment must dispose of all the issues and parties in a case. *North E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897-98 (Tex. 1966). If a judgment is rendered in a case regularly set for trial on the merits, it is presumed to be final, absent an order for separate trial or a reservation of claims for later disposition. *Aldridge*, 400 S.W.2d at 897-98. The remaining claims not expressly disposed of are considered waived, abandoned, dismissed, or discontinued. *Aldridge*, 400 S.W.2d at 896.

Proceeding to trial operates as a discontinuance to defendants that have not been served and do not appear at trial. *First Dallas Petroleum, Inc. v. Hawkins*, 715 S.W.2d 168, 169-70 (Tex. App.--Dallas 1986, no writ). When a plaintiff takes a judgment against the other defendants, the case stands as if there has been a dismissal with respect to the unserved defendant. *Hawkins*, 715 S.W.2d at 170. Such a judgment is a final, appealable judgment. *Hawkins*, 715 S.W.2d at 170.

Application of Law to Facts

The Graces' third amended petition named Smith, Stonebriar, CCS, Connally, and Steve G. Hanna d/b/a Concrete Contractors as defendants.

An agreed order of dismissal between the Graces and Stonebriar was entered on September 1, 1995. The trial court's October 5, 1994 judgment ordered: (1) Smith and CCS take nothing on their claims against the Graces; (2) the Graces take nothing on their claims against Connally and CCS; and (3) the Graces receive actual and punitive damages from Smith, individually. The judgment does not dispose of the Graces' claims against Hanna.

We questioned the finality of the trial court's judgment in this appeal, so we directed the parties to file a supplemental transcript containing an order expressly disposing of claims or parties that might remain pending. We stated that because the record did not affirmatively reflect whether Hanna was served, if a supplemental transcript containing an order expressly disposing of the Graces' claims against Hanna was not filed, this Court would presume Hanna was not served. The Graces responded that Hanna was never served with process. Smith did not respond.

During oral argument, the Graces and Smith conceded that Hanna was never served with process and never made an appearance. Because the Graces proceeded to trial and took a judgment against the other defendants, the case stands as if there has been a dismissal with respect to Hanna, the unserved defendant. *See Hawkins*, 715 S.W.2d at 170. Therefore, we conclude the October 5, 1994 judgment is a final, appealable judgment. See *Hawkins*, 715 S.W.2d at 170.

STATEMENT OF FACTS

In point of error one, Smith complains this Court erred in refusing to accept and file the statement of facts. Smith contends that if the Clerk of this Court had complied with rule 56(b) of the rules of appellate procedure, he would have timely filed a motion to extend the time to file the statement of facts, Smith also argues that a portion of the statement of facts was timely filed and the statement of facts that we rejected as untimely filed must be construed as a supplement to the partial statement of facts.

Applicable Law

The record on appeal shall consist of a transcript and, where necessary to the appeal, a statement of facts. TEX. R. App. P. 50(a). The transcript consists of the written pleadings and other papers filed with the trial court. *See* TEX. R. App. P. 51. The transcript is prepared and certified by the district clerk. *See* TEX. R. App. P. 51(c). The statement of facts, on the other hand, consists of a transcription of the trial proceedings and evidence. *See* TEX. R. App. P. 53(,a). The statement of facts is prepared and certified by the court reporter. *See* TEX. R. App. P. 53(f).

The statement of facts shall be filed within one hundred and twenty days after the judgment is signed if a motion for new trial is timely filed. TEX. R. App. P. 54(a). An extension of time may be granted for late filing in a court of appeals of a statement of facts if a motion is filed not later than fifteen days after the last date for filing the statement of facts. TEX. R. App. P. 54(c).

Appellant bears the ultimate burden of ensuring that the statement of facts is properly before this

Court. It is the appellant's responsibility to ensure that the statement of facts is timely filed or to make proper motion for an extension of time. *See* TEX. R. App. P. 53(k); *Nix v. Fraze*, 752 S.W.2d 118, 120 (Tex. App.--Dallas 1986, no writ). This Court has no authority to consider a late-filed statement of facts. *See* **TEX.** R. App. P. 54(a); *Office of Pub. Util. Counsel v. Public Util. Comm'n*, 878 S.W.2d 598, 599 (Tex. 1994). Failure to timely file the statement of facts does not affect the jurisdiction of the court of appeals, "but shall he ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant." TEX. R. App. P. 54(a), *see Office of Pub. Util. Counsel*, 878 S.W.2d at 599.

Failure of the clerk to notify the appellant the statement of facts is late does not excuse the appellant from his burden of ensuring the statement of facts is properly before the court of appeals. *See Meridian Resources v. Colley Gin Co.*, 430 S.W.2d 372, 373 (Tex. Civ. App.--Corpus Christi 1968, no writ).

Application of Law to Facts

The tiial court signed the final judgment on October 5, 1994. Because a timely motion for new trial was filed, the transcript and statement of facts were due in this Court on February 2, 1995. *See* TEX. R. App. P. 54(a). The transcript was timely filed on February 2, 1995. The statement of facts was tendered on February 8, 1995. On February 24, 1995, Smith filed a motion to extend the time for filing the statement of facts.

Smith contends that if the Clerk of this Court had complied with rule 56(b) of the rules of appellate procedure and had given him notice that the

statement of facts was not timely, he would have timely filed a motion to extend the time to file the statement of facts. It is Smith's responsibility, not the Clerk of this Court's responsibility, to ensure that the statement of facts is timely filed or to file a proper motion for an extension of time. *See Nix*, 752 S.W.2d at 120; *see also Meridian Resources*, 430 S.W.2d at 373.

Smith also argues that a portion of the statement of facts was timely filed and the statement of facts that we rejected as untimely filed must be construed as a supplement to the partial statement of facts. Smith filed a supplemental transcript on March 17, 1995. The supplemental transcript contains a portion of the cross-examination of one witness which was attached to the motion for new trial but was not included in the original transcript. Smith contends that this is a timely filed "partial statement of facts," and the statement of facts tendered to this Court on February 8, 1995 must be construed as a supplement to the partial statement of facts that was filed in the supplemental transcript on March 17, 1995. We disagree. The rules of appellate procedure clearly indicate that the transcript and the statement of facts are two separate documents. We conclude the transcription of testimony attached as an exhibit to the motion for new trial is not a statement of facts as contemplated by rule 53 of the rules of appellate procedure.
Because the statement of facts was tendered after the due date, and the motion to extend the time for filing the statement of facts was filed more than fifteen days after the statement of facts was due, we have no authority to consider the statement of facts. We overrule point of error one. *See* TEX. R. App. P. 54(a).

EVIDENTIARY POINTS OF ERROR

In point of error two, Smith complains the trial court's judgment was against the great weight and preponderance of the evidence. In point of error three, Smith complains the trial court miscalculated the actual damages awarded. In point of error four, Smith complains the trial court awarded damages that were not supported by the evidence. In point of error six, Smith complains the trial court erred by not applying the Residential Construction Liability Act. In point of error seven, Smith complains the trial court erred by entering a take-nothing judgment against CCS and a monetary judgment against CCS's employee, Smith, because an employee is only liable if the employee acts beyond the scope of his authority.

Applicable Law

We must address every issue raised and necessary to final disposition of the appeal. Tex. R. App. P. 90(a); *Office of Pub. Util. Counsel*, 878 S.W.2d at 599. Resolution of some issues will not necessarily require a statement of facts, such as those involving legal error. *Office of Pub Util. Counsel*, 878 S.W.2d at 599-600. The requirement of a statement of facts applies to issues which require reference to the evidence. *Segrest v. Segrest*, 649 S.W.2d 610, 611 (Tex.), *cert, denied*, 464 U.S. 894 (1983). In the absence of a complete statement of facts, we must presume that sufficient evidence was introduced in the trial court to support the judgment. *Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991); *see Collins v. Williamson Printing Corp.*, 746 S.W.2d 489, 491 (Tex. App.--Dallas 1988, no writ).

Application of Law to Facts

Points of error two, three, four, six, and seven require a review of evidence. Therefore, a complete statement of facts is required for these points of error. In the absence of a complete statement of facts, we must presume that sufficient evidence was introduced in the trial court to support the judgment. *See Schafer,* 813 S.W.2d at *155; see also Collins,* 746 S.W.2d at 491. We overrule points of error two, three, four, six, and seven.

Punitive Damages

In point of error five, Smith complains the trial court erred in awarding punitive damages. Specifically, Smith contends the Graces failed to properly plead punitive damages, and they were not established by the evidence.

Pleading Defect

A party waives any defect, omission, or fault in a pleading that is not specifically pointed out by a special exception. TEX. R. Civ. P. 90; *JX. & Susie L. Wadley Research Inst. & Blood Bank t@. Beeson,* 835 S.W.2d 689, 693 (Tex. App.--Dallas 1992, writ denied). The movant then has the burden to obtain a hearing to present its special exceptions to the trial court and obtain a ruling. *Hannen v. State Bar,* 860 S.W.2d 903, 912 (Tex. App.--Dallas 1993, no writ); *R.I.O. Syv., Inc. v. Union Carbide Corp.,* 780 S.W.2d 489, 491 (Tex. App.--Corpus Christi 1989, writ denied). If the record does not show the movant obtained a ruling on the special exceptions, the movant has failed to preserve this complaint for appellate review. TEX. R. App. P. 52(a); *Hanners,* 860 S.W.2d at 912; *R.I.O. Sys., inc.,* 780S.W.2d at 491.

Smith filed a special exception complaining of the Graces' pleading. The record does not contain a ruling on the special exceptions. Therefore, Smith waived any complaint concerning pleading deficiencies. *See* TEX. R. App. P, 52(a); *see also Hanners*, 860 S.W.2d at 912; *R.I,O. Sys., Inc.*, 780 S.W.2d at 491.

Sufficiency of the Evidence

Point of error five also complains that punitive damages were not established by the evidence as required by *Transportation Insurance. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994). This issue requires us to resolve the tension between two seemingly conflicting areas of law.

On one hand, this Court has no authority to consider a late-filed statement of facts. *See* TEX. R, App. P. 54(a); *Office of Pub. Util Counsel*, 878 S.W.2d at 599. The requirement of a statement of facts applies to issues which require reference to the evidence. *Segrest*, 649 S.W.2d at 611. In the absence of a complete statement of facts, we must presume that sufficient evidence was introduced in the trial court to support the judgment. *See Schafer*, 813 S.W.2d at *155; see also Collins*, 746 S.W.2d at 491.

On the other hand, punitive damages require appropriate procedural and substantive safeguards to minimize the risk of unjust punishment. Moriel, 879 S.W.2d at 16-17. Courts of appeals must therefore "carefully scrutinize punitive awards to ensure they are supported by the evidence." *Moriel*, 879 S.W.2d at 31.

The Moriel court held "the court of appeals, *when conducting a factual sufficiency review* of a

punitive damages award, must hereafter detail the relevant evidence in its opinion, explaining why that evidence either supports or does not support the punitive damages award in light of the *Kraus* factors." Mot7el, 879 S.W.2d at 31 (discussing Alamo *Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981)) (emphasis added). Thus, *Moiiet* requires consideration of evidence adduced at trial. *Ellis County State Bank v. Keever*, 39 Tex. Sup. Ct. J. 120, 121 (November 16, 1995).

In summary, the conflict is this: Although *Moriel and Keever* require us to explain whv the evidence either supports or does not support the punitive damages award, we can do neither in the absence of a statement of facts.

The starting point for our analysis is the language from the *Moriel* opinion that we must detail the relevant evidence *"when conducting a factual sufficiency review* of a punitive damages award." *Moriel*, 879 S.W.2d at 31 (emphasis added). Clearly, the *Moriel* requirement only applies when this Court conducts a factual sufficiency review. The *Moriel* requirement does not apply when this Court is precluded from conducting a factual sufficiency review, such as when there is no statement of facts.

Because the issue of whether punitive damages are supported by the evidence is not strictly a question of law, in the absence of a complete statement of facts, we must presume that sufficient evidence was introduced in the trial court to support the judgment. *See Schafer*, 813 S.W.2d at *155; Segrest*, 649 S.W.2d at 611; *Collins*, 746 S.W.2d at 491.

A more practical consideration provides additional guidance. If a party that was liable for

punitive damages could successfully have the trial court judgment reversed by not filing a statement of facts, both the appellate and trial processes would be undermined.

We overrule point of error five. Accordingly, we affirm the trial court's judgment.

TOM JAMES
JUSTICE

Publish
Tex. R. App. P. 90
9500155F.P05

EXHIBIT "B"

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

August 1, 1996

Mr. Robert K. Dowd
Dowd & Blount
2828 Woodside Street
Dallas, Tx 75204-2582

Mr. Charles W Blount, III
Dowd & Blount
2828 Woodside Street
Dallas, Tx 75204-2582

Mr. Joseph G. Chumlea
Bragg, Chumlea McQuality Smithers & Curry
3102 Maple Avenue, Suite 330
Dallas, TX 75201

RE: Case Number 96-0461
Style: LARRY F. SMITH
V.
EDWARD J. and DIANA GRACE

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

EXHIBIT "C"

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

October 3, 1996

Mr. Robert K. Dowd
Dowd & Blount
2828 Woodside Street
Dallas, Tx 75204-2582

Mr. Charles W Blount, III
Dowd & Blount
2828 Woodside Street
Dallas, Tx 75204-2582

Mr. Joseph G. Chumlea
Bragg, Chumlea McQuality Smithers & Curry
3102 Maple Avenue, Suite 330
Dallas, TX 75201

RE: Case Number 96-0461
Style: LARRY F. SMITH
V.
EDWARD J. and DIANA GRACE

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk

EXHIBIT "D"

PRELIMINARY DRAFT OF PROPOSED REVISIONS TO THE TEXAS RULES OF APPELLATE PROCEDURE

This draft consists of the initial recommendations of the Supreme Court Advisory Committee, edited for style by Bryan A. Garner, with tentative modifications by the Supreme Court. This draft has not been approved by the Supreme Court or the Court of Criminal Appeals, nor has it been finally reviewed by the Advisory Committee or Mr. Garner.

November 20, 1996

CURRENT RULE	PROPOSED RULE
RULE 53. THE STATEMENT OF FACTS ON APPEAL	**RULE 53. THE STATEMENT OF FACTS ON APPEAL**
	(a) Contents. (1) *Stenographic recording.* If the proceedings were stenographically recorded, the statement of facts consists of the court reporter's transcription of so much of the proceedings, and any of the exhibits, that the parties to the appeal designate. (2) *Electronic recording.* If the proceedings were electronically recorded, the statement of facts consists of certified copies of all tapes or other audio-storage devices on which the proceedings were recorded, any of the exhibits Unit the parties to the appeal designate, and certified copies Of the typewritten and original logs prepared by the court recorder under Rule 11(b).
(a) **Appellant's Request.** The appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter	**(b) Request for Preparation.** (1) *Request to court reporter or recorder.* At or before the time for perfecting the appeal, the

designating the portion of the evidence and other proceedings to be included therein. A copy of such request shall be filed with the clerk of the trial court and another copy served on the appellee. Failure to timely request the statement of facts under this paragraph shall not prevent the filing of a statement of facts or a supplemental statement of facts within the time prescribed by Rule 54(a). (b) **Other Requests** Within ten days after service of a copy of appellant's request, any party may in the same manner request additional portions of the evidence and other proceedings to be included.	appellant must request in writing that the official reporter or recorder prepare the statement of facts. The request must designate the exhibits to be included. A request to the court reporter must also designate the portions of the testimony to be included, (2) *Filing,* The appellant must file a copy of the request with the trial court clerk. (3) *Failure to timely request.* An appellate court must not refuse to file a statement of facts or supplemental statement of facts because of a failure to timely request it.

CURRENT RULE	PROPOSED RULE
(c) **Abbreviation of Statement** All matters not essential to the decision of the questions presented on appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document appearing in the statement of facts shall be excluded. All documents shall be abridged by omitting all irrelevant and formal portions thereof. (d) **Partial Statement** If appellant requests or prepares a partial statement of facts, he shall include in his request or proposal a statement of the points to be relied on and shall thereafter be limited to such points. If such statement is filed, there shall be a presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal. Any other party may designate additional portions of the evidence to be included in the statement of facts.	(c) Partial Statement. (1) *Effect on appellate points or issues.* If the appellant requests a partial statement of facts, the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues. (2) *Other parties may designate additions.* Any other party may designate additional exhibits and portions of the testimony to be included in the statement of facts, (3) *Costs; requesting unnecessary matter.* Additions requested by another party must be included in the statement of facts at the appellant's cost. But if the trial court finds that all or part of the designated additions are unnecessary to the appeal, the trial court may order the rather party to pay the costs of the unnecessary additions. This paragraph does not affect the appellate court's power to tax costs differently.

Unnecessary Portions. In civil cases if either party requires more of the testimony or other proceedings than is necessary, he shall be required by the appellate court to pay the costs thereof, regardless of the outcome of the appeal.

(4) *Presumption.* The appellate court must presume that the partial record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue.

Criminal cases. In a criminal case, if the statement contains a point completing that the evidence is insufficient to support a finding of guilt, the record must include all the evidence admitted at the trial on the issue of guilt or innocence.

(d) Supplementation. If anything is omitted from the statement of facts, the trial court, the appellate court, or any party may by letter direct the official court reporter or recorder to prepare, certify and file in the appellate court a

	supplemental statement of facts containing the omitted items. Any supplemental statement of facts is part of the appellate record.

CURRENT RULE	PROPOSED RULE
	(e) Inaccuracies in the Statement of Facts *(1) Correction by agreement.* The parties may agree to correct an inaccuracy in the statement of facts without the court reporter's or court recorder's recertification. *(2) Correction by trial court.* If the parties dispute whether the statement of facts accurately discloses what occurred in the trial court, or the parties agree that it is inaccurate but cannot agree on corrections to the statement of facts, the trial court must · after notice and hearing · settle the dispute. After doing so, the court must order the court reporter or court recorder to conform the statement of facts to what occurred in the trial court, and to certify and file in the appellate court a corrected statement of facts. (3) *Correction after filing in appellate court.* If the

	dispute arises after the statement of facts has been filed in the appellate court, that court must submit the dispute to the trial court for resolution. The trial court must then ensure that the statement of facts is made to conform to what occurred in the trial court.
	(f) Statement Lost or Destroyed. An appellant may be entitled to a new trial under the following circumstances: (1) if the appellant has timely requested a statement of facts, (2) if, without the appellant's fault, a significant portion of the court reporter's notes and records has been lost or destroyed or - if the proceedings were electronically recorded a significant portion of the recording has been lost or destroyed or is inaudible, (3) if the lost, destroyed, or inaudible portion is necessary to the appeal's

	resolution; and (4) if the parties cannot agree on a complete statement of facts.
(f) Certification by Court Reporter. The statement of facts shall be in sufficient form to be filed in the appellate court when it is certified by the official court reporter.	
(g) Reporter's Fees. The official court reporter shall include in his certification the amount of his charges for preparation of the statement of facts. The Supreme Court and the Court of Criminal Appeals may from time to time make an order providing the fees which court reporters may charge.	

CURRENT RULE	PROPOSED RULE
(h) Form. The Supreme Court and the Court of Criminal Appeals will make an order or orders directing the form of the statement of facts and the court reporter will prepare the same in conformity therewith.	
(i) Narrative Statement. A statement of facts prepared by the official reporter shall be in question and answer form. In lieu of requesting such a statement of facts, a party may prepare and file with the clerk of the trial court a condensed statement in narrative form of all or part of the testimony and deliver a true copy to the opposing party or his counsel, and such opposing party, if dissatisfied with the narrative statement, may within ten days after such delivery, require the testimony in question and answer form to be substituted for all or part thereof	
(j) Free Statement of Facts. *(1) Civil Cases.* In any case where the appellant	

has filed the affidavit required by Rule 40 to appeal his case without bond, and no contest is filed, or any contest is overruled, the court Or judge upon application of appellant shall order the official reporter to prepare a statement of facts, and to deliver it to appellant, but the court reporter shall receive no pay for same. *(2) Criminal Cases.* Within the time prescribed for perfecting the appeal an appellant unable to pay for the statement of facts may, by motion and affidavit, move the trial court to have the statement of facts furnished without charge, After hearing the motion, if the court finds the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, and when the court certifies that the statement of facts has been furnished to the appellant, the court reporter shall be paid from the general funds of the county, by the county in	

which the offense was committed the sum set by the trial judge	
(k) Duty of Appellant to File. It is the appellant's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.	

CURRENT RULE	PROPOSED RULE
	(g) Original Exhibits. *(1) Reporter or recorder may use in preparing statement of facts,* At the court reporter's or recorder's request, the trial court clerk must deliver all original exhibits to the reporter or recorder for use in preparing the statement of facts. Unless ordered to include original exhibits in the statement of facts, the court reporter or recorder must return the original exhibits to the clerk after copying them for inclusion in the statement of facts. If someone other than the trial court clerk possesses an original exhibit, either the trial court or the appellate court may order that person to deliver the exhibit to the trial court clerk. *(2)Use of original exhibits by appellate court.* (A) If the trial court determines that original exhibits should be inspected by the appellate court or sent to that court in lieu of copies, the trial court must make an order for the

safekeeping, transportation, and return of those exhibits. The order must list the exhibits and briefly describe them.

(B) To the extent practicable, all the exhibits must be arranged in their listed order and bound firmly together before being sent to the appellate clerk.

(C) On any party's motion or its own initiative, the appellate court may direct the trial court clerk to send it any original exhibit.

(h) Duplicate Statement in Criminal Cases. In a criminal case, in which a party asks for a statement of facts to be included in the record, the court reporter must prepare a duplicate of the statement of facts and file it with the trial court clerk.

(l) Duplicate Statement in Criminal Cases. In criminal cases, if any party desires a statement of facts included in the record, a duplicate o the statement of facts shall be prepared by the court reporter and filed with the clerk of the court.

(m) When No Statement of Facts Filed in Appeals of Criminal Cases. If the clerk of the appellate court does not receive a statement of facts when due, he shall notify the trial judge and the

appellant's attorney, if the appellant's attorney can be determined from the transcript, that a statement of facts has not been filed and that in the absence of a statement of facts the appeal will be submitted on the transcript alone. If no statement of facts has been filed, the appellate court may order the trial court to hold a hearing to determine whether the appellant has been deprived of a statement of facts because of ineffective counsel or for any other reason, to make findings of fact and conclusions of law, to appoint counsel if necessary, and to transmit to the appellate court the record of the hearing. The appellate court may order a late filing of statement of facts.

CURRENT RULE	PROPOSED RULE
	(i) Supreme Court and Court of Criminal Appeals May Set Fee. From time to time, the Supreme Court and the Court or Criminal Appeals may set the fee that the court reporters and recorders may charge for preparing the statement of facts.
	Notes and Comments Comment to 1997 change: The rule is substantially rewritten. Subdivision (a) defining the statement of facts is new. Former subdivision (a) is now subdivision (b) Former subdivisions (b) (Other Requests), (d) (Partial Statement) and (e) (Unnecessary Portions) are merged into subdivision (c). Subdivision (d) is new. The provisions of subdivision (e) were moved here from former Rule 55. The provisions of subdivision (f) were moved here from former Rule 50(d). The provisions of former subdivisions (f) Certification by Court Reporter) and (h) (Form) are moved to the order of

	the Supreme Court and the Court of Criminal Appeals on the preparation of the statement of facts. Former subdivision (i) (Narrative Statement) is repealed. The provisions of former subdivision (j) (Free Statement of Facts) are moved to Rule 46. Former subdivision (k) (Duty of Appellant to File) is repealed, it is now the duty of the court reporter to file the statement of facts. The provisions of subdivision (g) are moved here from former Rule 51(d), Former subdivision (g) is now subdivision (i). Former subdivision (l) is now subdivision (h). The provisions of former subdivision (m) are moved to Rule 54.

CURRENT RULE	PROPOSED RULE
RULE 54. TIME TO FILE RECORD	**RULE 54. TIME TO FILE RECORD: RESPONSIBILITY FOR FILING RECORD**
(a) In Civil Cases-Ordinary Timetable. The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, or if any party has timely filed a request for findings of fact and conclusions of law in a case tried without a jury, within one hundred twenty days after the judgment is signed. If a writ of error has been perfected to the court of appeals the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials	**(a) Civil Cases** The appellate record must be filed in the appellate court within 30 days after the notice of appeal is filed, except in an accelerated appeal in which case the record must be filed within 10 days after the notice of appeal is filed.

filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. The court has authority to consider all timely filed transcripts and statements of facts, but shall have no authority to consider a late filed transcript or statement of facts, except as permitted by this rule.	
(b) In Criminal Cases - Ordinary Timetable. The transcript and statement of facts shall be filed in the appellate court within sixty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed, if a motion for new trial is not filed. If a timely motion for new trial is filed, the transcript and statement of facts shall e filed within one hundred twenty days after the day sentence is imposed or suspended in open court or the order appealed from has been signed.	**(b) Criminal Cases** The appellate record must be filed in the appellate court: (1) if a motion for new trial is not filed, within 60 days after the date the sentence is imposed or suspended in open court or the order appealed from is signed; or (2) if a timely motion for new trial is filed, within 120 days after the date the sentence is imposed or suspended in open court or the order appealed from is signed.
(e) Extension of Time. An extension of time may	**(c) Responsibility for Filing Record.**

be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed by appellant with the court of appeals not later than fifteen days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required by Rule 53(a).	*(1)Transcript.* The trial court clerk is responsible for preparing, certifying, and timely filing the transcript if. (A) a notice of appeal has been filed, and (B) the party responsible for paying for the preparation of the transcript has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without payment of the fee.

CURRENT RULE	PROPOSED RULE
	(2) Statement of Facts. The official or deputy reporter or recorder is responsible for timely filing the statement of facts if (A) a notice of appeal has been filed; (B) the appellant has requested that the statement of facts be prepared; and (C) the party responsible for paying for the preparation of the statement of facts has paid the reporter's Or recorder's fee, or has made satisfactory arrangements with the reporter or recorder to pay the fee, or is entitled to appeal without payment of the fee. *(3) Courts to ensure record timely filed,* The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed. The appellate court must allow the record to be filed late when the delay is not the appellant's fault, and may do so when the delay is the appellant's

	fault.
	Notes and Comments Comment to 1997 change: In subdivision (a), the time to file the record in civil cases is now based on the date the notice of appeal is filed rather than on the date of the trial court's judgment. Subdivision (c) is new and makes it the responsibility of the trial court clerk and court reporter to file the record. Former subdivision (c), providing for air extension of time to file the record, is repealed as unnecessary.

CURRENT RULE	PROPOSED RULE
RULE 56. RECEIPT OF THE RECORD BY COURT OF APPEALS	**RULE 56. DUTIES OF THE APPELLATE CLERK ON RECEIVING THE NOTICE OF APPEAL AND RECORD**
(a) Duty of Clerk on Receiving Transcript. The clerks of the courts of appeals shall receive the transcripts delivered and sent to them, and receipt for same is required; but they shall not be required to take a transcript out of the post office or any express office, unless the postage or charges thereon be fully paid. Upon receipt of the transcript, it shall be the duty of the clerk to examine it in order to ascertain whether or not, in case of an appeal, a proper appeal bond, notice of appeal or affidavit in lieu thereof (when bond is required) have been given, and in case of a writ of error, whether or not the petition and bond or affidavit in lieu thereof (when bond is required) appear to have been filed. If it seems to the clerk that the appeal or writ of error has not been	(a)**On Receiving the Notice of Appeal.** On receiving a copy of the notice of appeal , the appellate clerk must (1) endorse on the copy the time of receipt, (2) docket the appeal ! and notify all parties of receipt of the notice.

duly perfected, the clerk shall note on the transcript the day of its reception and refer the matter to the court. If upon such reference the court shall be of the opinion that the transcript shows that the appeal or writ of error has been duly perfected, it shall order the transcript to be filed as of the date of its reception. If not, it shall cause notice of the defect to issue to the attorneys of record of the appellant, to the end that they may take steps to amend the record, if it can be done for which a reasonable time shall be allowed. If the transcript does not show the jurisdiction of the court, and if after notice it is not amended, the appeal shall be dismissed	

CURRENT RULE	PROPOSED RULE
If a transcript, properly endorsed (when endorsement is required), is received by the clerk within the time allowed by these rules, the clerk shall endorse his or her filing thereon, showing the date of its reception, and shall notify both appellant and the adverse party of the receipt of tile transcript. If it is not properly endorsed, or an original transcript is received after the time allowed, the clerk shall, without filing it, make a memorandum upon it of the date of its reception and keep it in his or her office subject to the direction of the person who applied for it or to the disposition of the court, and shall notify the person who applied for a transcript why it has not been filed. The transcript shall not be filed until a proper showing has been made to the court for its not being properly endorsed or received in proper time, and upon this being done, the court may order it filed, if the	**(b)** **(b) Docket Numbers,** *(1) Numbering system.* Each case filed in a court of appeals must be assigned a docket number consisting of the following four parts, separated by hyphens: (A) the number of the court of appeals district; (B) the last two digits of the year in which the case is filed, (C) the number assigned to the case and (D) the designation "CV' for a civil case or "CR" for a criminal case. (2) *Numbering order.* Each case must be docketed in the order of its filing. (3) *Appeals not yet filed* A motion relating to an appeal that has been perfected but not yet filed must be docketed and assigned a docket number that will also be assigned to the appeal when it is filed.

rules have been complied with, upon such terms as may be deemed proper, having respect to the rights of the opposite party.	
	(c) Defective or Improper Notice- if the appellate clerk determines that the notice of appeal is defective, tile clerk must notify the parties of the defect so that it can be remedied, if possible. If a proper notice of appeal is not filed in the trial court within 30 days of the date of the clerk's notice, the clerk must refer the matter to the appellate court, which will make an appropriate order.
(b) Duty of Clerk on Receiving Statement of Facts. Upon receipt of a statement of facts, the Clerk shall ascertain if it is presented within the time allowed and also if it has been properly authenticated in accordance with these rules. If the clerk finds that the statement of facts is presented in time and has been certified by the official court reporter,	**(d) On Receiving the Record.** On receiving the transcript from the trial court clerk or the statement of facts from the reporter or recorder, the appellate clerk must determine whether each complies with the Supreme Court's and Court of Criminal Appeals' order on preparation of the record, If so, the clerk must endorse on each the date

the clerk shall file it forthwith; otherwise, the clerk shall endorse thereon the time of the receipt of such statement of facts, hold the same subject to the order of the court of appeals, and notify the party (or the party's attorney) tendering the statement of facts of the action and state the reasons therefor.	of receipt, file it, and notify the parties of the filing and the date. If not, the clerk must endorse on the transcript or statement of facts whichever is detective · the date of receipt and return it to the official responsible for filing it. The appellate court clerk must specify the defects and instruct tile official to correct them and return the transcript or statement of facts to the appellate court by a specified date.

CURRENT RULE	PROPOSED RULE
	(e) If No Record Filed. **(1)** *Notice of late record* If the transcript or statement of facts has not been timely filed , the clerk must send notice to the official responsible for filing it stating that the record is late and requesting that the record be filed within 30 days. The appellate clerk must send a copy of this notice to the parties and the trial court. If the clerk does not receive the record within 30 days of the date of the notice, the clerk must refer the matter to the appellate court. The court must make whatever order is appropriate to avoid further delay and to preserve the parties' rights, (2) *If no transcript filed due to appellant's fault.* If the trial court clerk failed to file the transcript because the appellant failed to pay or make arrangements to pay the clerk's fee for preparing the transcript, the appellate court may - on

	a party's motion or its own initiative · dismiss the appeal for want of prosecution unless the appellant was entitled to proceed without payment of costs. The court must give the appellant a reasonable opportunity to cure before dismissal.
(3)	*If no statement of facts filed due to appellant's fault.* Under the following circumstances, and if the transcript has been filed, the appellate court may after first giving the appellant notice and a reasonable opportunity to cure · consider and decide those issues or points that do not require a statement of facts for a decision. The court may do this if no statement of facts has been filed because
(4)	(A) the appellant failed to request a statement of facts, or
(5)	(B) (i) appellant failed to pay or make arrangements to pay the reporter's or recorder's fee to prepare the statement of facts, and (ii) the appellant is not entitled to proceed

	without payment of costs.
	Notes and Comments Comment to 1997 change: Subdivision (a) is new. The provisions of subdivision (b) are moved here from former Rule 57(a). Subdivision (c) is new. The provisions of subdivision (d) are taken from former subdivisions (a) and (b). Subdivision (e) is new.

CURRENT RULE	PROPOSED RULE
RULE 83. NO AFFIRMANCE, REVERSAL OR DISMISSAL FOR WANT OF FORM OR SUBSTANCE	**RULE 83. NO AFFIRMANCE, REVERSAL, OR DISMISSAL FOR PROCEDURAL DEFECTS OR IF ERROR REMEDIAL**
A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities in appellate procedure, either in form or in substance, without reasonable time to correct or amend such defects or irregularities provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54 and except that in criminal cases late filing of the transcript or statement of facts may be permitted on a showing that otherwise the appellant may be deprived of effective assistance of counsel.	(a) **Defects in Procedure-** A court of appeals must not affirm or reverse a judgment or dismiss an appeal for defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities.
	(b) Remediable Error of the Trial Court (1) *Generally.* A court of appeals must not affirm or reverse a judgment or dismiss an appeal if.

	(A) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals, and (B) the trial court can correct its action or failure to act. (2) *Court of appeals direction if error remediable.* If the circumstances described in (1) exist, the court of appeals must direct the trial court to correct the error. The court of appeals will then proceed as if the erroneous action or failure to act had not occurred.
	Notes and Comments Comment to 1997 change: Subdivision (a) is amended to delete "form or substance" and to delete the provisions regarding the late filing of the record. Subdivision (b) is moved here from former Rule 81(a).